APPEAL NO. 042024
FILED OCTOBER 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on July 14, 2004. With respect to the issues before him, the hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury on _____; (2) the claimant has disability beginning February 11, 2004, and continuing through the date of the hearing; and (3) the appellant (carrier) is not relieved of liability under Section 409.002 of the 1989 Act because of the claimant's failure to timely notify his employer pursuant to Section 409.001. The carrier appeals the determinations on sufficiency of the evidence grounds, arguing that the hearing officer was "bound and determined to find for the claimant." In his response to the carrier's appeal, the claimant urges affirmance.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The hearing officer did not err in making the complained-of determinations. Although the carrier asserted that the hearing officer was determined to find for the claimant, there was nothing in the record which clearly demonstrates bias or predisposition toward either party. The determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In the instant case, one of the issues was whether the claimant had good cause for not reporting an injury to his employer within 30 days of the injury. The claimant asserted that he was injured on _____. Sections 409.001(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day after the date on which the injury occurs and that the notice may be given to an employee of the employer who holds a supervisory or management position. Section 409.002 provides, in part, that the failure to notify an employer as required by Section 409.001(a) relieves the employer and the employer's insurance carrier of liability unless the employer or the carrier have actual knowledge of the injury or the Texas Workers' Compensation Commission (Commission) determines that good cause exists for failure to provide notice in a timely manner. An employee who fails to give the employer notice of the injury within the 30-day period has the burden to show good cause for such failure. Aetna Casualty & Surety Company v. Brown, 463 S.W.2d 473 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.). The test for good cause is that of ordinary prudence, that is, whether the employee has prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207

S.W.2d 370 (1948). It has also been held that the existence of good cause must generally continue up to the time the otherwise untimely report of injury is made, although an immediate reporting is not required. Texas Workers' Compensation Commission Appeal No. 93677, decided September 21, 1993. Whether an employee has exercised that degree of diligence required under the ordinarily prudent person test is usually a question of fact for the fact finder. A claimant's conduct must be examined "in its totality" to determine whether the ordinary prudence test was met, and the reason for delay will generally be found in the claimant's own testimony. *See* Farmland Mutual Insurance Company v. Alvarez, 803 S.W.2d 841 (Tex. App.-Corpus Christi 1991, no writ). In the case at hand, the 30th day after the claimed injury was (claimed injury date). Although the hearing officer did not make a specific finding of fact concerning the date the injury was reported to the employer, the hearing officer states in the Background Information Section of the decision and order that "the (City) Field Office contacted the employer about Claimant's injury on March 8, 2004." The claimant was dismissed by his employer on February 11, 2004, at least partially for cause. The evidence also showed that the claimant sought a medical opinion on February 17, 2004, advising the doctor that he had been injured while working on a forklift. The claimant visited the Commission local field office on February 18, 2004, to file a claim. He testified that he thought the Commission would notify his employer. The claimant sought additional medical attention on February 26, 2004. Reviewing the totality of the circumstances, the hearing officer concluded that the claimant had prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under these circumstances and that he had good cause for untimely reporting his injury to the employer.

Nothing in our review of the record indicates that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Chris Cowan
Appeals Judge

_____
Margaret L. Turner
Appeals Judge